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In The

SUPREME COURT OF THE UNITED STATES

December Term, 1992

GILBERT L. DOWDY,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

Petition for Writ of Certiorari
To The United States Court of Appeals
For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. WHETHER THE CUMULATIVE EFFECT OF THE ARGUMENTS BETWEEN THE DEFENDANT'S TRIAL COUNSEL AND THE TRIAL COURT SUBSTANTIALLY PREJUDICED THE DEFENDANT'S RIGHTS TO EFFECTIVE ASSISTANCE OF COUNSEL, A FAIR TRIAL AND DUE PROCESS OF LAW AS GUARANTEED AN ACCUSED PURSUANT TO THE FIFTH AND SIXTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AS THIS ISSUE IS AN IMPORTANT QUESTION OF FEDERAL LAW AFFECTING THE ADMINISTRATION OF CRIMINAL JUSTICE AND THE EIGHTH CIRCUIT'S OPINION IN PART IS IN CONFLICT WITH ITSELF AND OTHER CIRCUITS.

II. WHETHER THERE WAS SUFFICIENT EVIDENCE TO ESTABLISH A VIOLATION OF 18 U.S.C. § 1956(a)(l)(B) WHEN THE GOVERNMENT FAILED TO INTRODUCE EVIDENCE OF A PLAN OR SCHEME DESIGNED TO CONCEAL THE NATURE, SOURCE OR OWNERSHIP OF THE FUNDS USED IN THE TRANSACTIONS AT ISSUE AS THIS ISSUE IS AN IMPORTANT QUESTION OF FEDERAL LAW THAT AFFECTS THE ADMINISTRATION OF CRIMINAL JUSTICE AND WILL GIVE MEANINGFUL INTERPRETATION TO THE SCOPE OF THE SO-CALLED MONEY LAUNDERING STATUTES.

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CITATIONS TO OFFICIAL REPORTS OF OPINIONS IN CASE

The opinion of the United States Court of Appeals for the Eighth Circuit, whose judgment is herein sought to be reviewed, was decided and filed on September 14, 1992. The opinion is reported as *United States of America v. Turner*, 975 F.2d 490 (8th Cir. 1992), and set forth in the Appendix at APP.1 through APP.15. Robert Turner, Gilbert Dowdy and Steven D. Baker appealed their convictions to the Eighth Circuit. Their appeals were consolidated.

STATEMENT OF JURISDICTION

The appeal of *United States v. Gilbert Dowdy* was decided by a panel of the United States Court of Appeals for the Eighth Circuit on September 14, 1992. Timely petitions for rehearing were filed. Said petitions for rehearing were denied October 21, 1992. The Supreme Court of the United States has jurisdiction to review this Petition for Writ of Certiorari pursuant to 28 U.S.C. § 1254(1) (1988).

CONSTITUTIONAL PROVISIONS AND STATUTES

18 U.S.C. § 1956 Laundering of Monetary Instruments

(a) (1) whoever, knowing that the property involved in a financial transaction represents the proceeds as some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity

(B) knowing that the transaction was designed in whole or in part —

(i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activities; or

(ii) to avoid a transaction reporting requirement under state or federal law,

1. Shall be sentenced to a fine of not more than $500,000.00 or twice the value of the property involved in the transaction which ever is greater, or imprisonment for not more than twenty years, or both.

STATEMENT OF CASE

A. Procedural Statement of the Case

On February 20, 1990, a grand jury returned a 27 Count Indictment against eleven defendants, including Petitioner Gilbert Dowdy. The grand jury charged Petitioner Gilbert Dowdy on 19 Counts including violations of the federal narcotic conspiracy statutes, Title 21 U.S.C. § 841 (a) (1) and (b) (1) (A), 21 U.S.C. § 846, and 18 U.S.C. § 2, using a fire arm in relation to drug trafficking offenses, 18 U.S.C. § 924 (c), assaulting a police officer, 18 U.S.C. § lll, 114, obstructing currency transactions, 31 U.S.C. § 5324 (3), 5322 (b), and 18 U.S.C. § 2, and money laundering, 18 U.S.C. § 1956 (a) (1) (B) (i) and 2.

The trial by jury began on September 4, 1990. On or about November 13, 1990, the jury returned their verdicts convicting Gilbert Dowdy of only four counts consisting of Count One, conspiracy to distribute cocaine, Count Nineteen, structuring currency transactions, and Counts Twenty-Three and Twenty-Four, money laundering. Petitioner was sentenced to life-imprisonment on Count One, conspiracy to distribute cocaine; one hundred and twenty months on Count Nineteen, structuring currency transactions; and two hundred and forty months

prisonment on Count One, conspiracy to distribute cocaine; one hundred and twenty months on Count Nineteen, structuring currency transactions; and two hundred and forty months each on Counts Twenty-Three and Twenty-Four, money laundering, all sentences to run concurrently.

Petitioner timely filed his notice of appeal. The Eighth Circuit entered its opinion affirming the jury verdict on September 14, 1992. The Petitioner filed his petition for rehearing which as denied on October 21, 1992.

B. Factual Statement of the Case

The indictment charged Petitioner with conspiracy to distribute cocaine and cocaine base "crack" from sometime early in 1981 to on or about January 19, 1990 at Kansas City, in the Western District of Missouri and elsewhere.

At trial, the government advanced the theory that Gilbert Dowdy was the leader of a large drug organization. In the early stages of the alleged conspiracy, the government maintained that Gilbert Dowdy actually controlled retail drug houses. Later, Gilbert Dowdy allegedly sold larger quantities ("weight") but only to people he trusted. The government's theory of the case essentially reflected a hierarchy of responsibilities within the alleged conspiracy with Petitioner Gilbert Dowdy at the helm.

The government's evidence included testimony from witnesses who allegedly transported and sold cocaine for Gilbert Dowdy, and who stored brown paper sacks filled with money paid to Petitioner in exchange for cocaine. Testimony also included examples of hand-to-to-hand sales between paid informants and members of the alleged conspiracy. No controlled distributions of cocaine or cocaine base "crack" were made

between any paid informants and Petitioner Gilbert Dowdy.

Several government agents testified regarding documents found at Petitioner Gilbert Dowdy's residence, linking houses searched in this case pursuant to several search warrants; regarding hand-to-to-hand sales by a government informant; and conversations between petitioner Dowdy and another individual allegedly in reference to cocaine transactions.

Evidence was also introduced regarding the use of cellular and mobile phones and pagers by both indicted and unindicted alleged co-conspirators. The government also introduced summaries of mobile phone records reflecting the number of times certain mobile phones were used to place calls to other mobile phones and pagers and home phones of defendants in this case.

1. FACTS REGARDING ARGUMENTS BETWEEN TRIAL COUNSEL AND COURT.

The trial transcript also reflects several significant verbal exchanges between Petitioner's trial counsel and the district court. The confrontations occurred both in and out of the presence of the jury. The arguments arose on issues concerning the phrasing of questions, evidentiary issues, repetitive questions, the use of witnesses, and several other issues. The arguments were often vigorous and resulted in defense counsel being held in contempt on four separate occasions during the trial. See, Tr. Vol., XIII. pp. 159-160; Tr. Vol., XIX, pp. 52-52; Tr. Vol., XXIV, pp. 81-83; Tr. Vol., XXXIII, pp. 51-56. The transcript reveals numerous occasions of confrontation between defendant's trial counsel and the trial court.

The conflict between the trial court and defense counsel began prior to trial, when defense counsel objected to the

Court's order that co-counsel should be retained in the event that defense counsel's pregnancy disabled her from representing this defendant at trial. Defense counsel abided by this suggestion, but only after a vigorous objection.

Apparently, out of frustration to trial counsel's conduct, the court objected to some questions not on the ground of scope or an evidentiary violation, but because the question as posed was grammatically unappealing to the court. Additionally, the court declared that the case was "not going to be decided by the weight of cuteness." At one point, the court also assumed an objection by defendant's counsel, stated the objection, and overruled it all in one sentence. Further, in a rather heated exchange trial counsel invoked the name of Jesus which resulted in defendant's counsel being cited for contempt a second time. Again, see Tr. Vol., XIX, p.53.

In another confrontation, defendant's counsel argued with the court on a ruling for an extended period of time, wherein she called the court's ruling and practice "sloppy." The court responded by labeling her practice as being "sloppy," and telling her to "be quiet." Then, following the colloquy, defendant's counsel, in the hearing of the jury, attacked the court and stated that the court's dislike for her had prejudiced her case. Yet, the arguments continued and culminated in defendant's counsel being cited for contempt a third time. See, Tr. Vol., XXIV, pp. 81-83.

In the latter stages of the trial, the arguments between defense counsel and the court became even more frequent. For example, upon an objection by defendant's counsel, the court commented that her objection was "ridiculous" and ordered her to "sit down." Shortly after the exchange, the court ordered defense counsel to "ask questions and get answers and do it now." Clearly, the court was frustrated and subsequently

remarked that defense counsel's question was "ridiculous."

At the end of the trial, in the hearing of the jury, defendant's counsel and the court argued at length about whether someone from the court had called one of the defendant's witnesses and told him not to come to court to testify. This incident resulted in defense counsel being fined and "locked up" for contempt yet a fourth time. See, Tr. Vol., XXXIII pp. 51-56. *See also, United States v. Dowdy*, 960 F.2d 78 (8th Cir. 1992) (affirming District Court's contempt citations). In two separate incidents, counsel for the co-defendants moved for a mistrial based upon the nature of the confrontations between Gilbert Dowdy's counsel and the court.

In addition to the incidents in the presence and hearing of the jury, there were several exchanges between the parties out of the presence and hearing of the jury. For example, during a conference in the court's chambers, the two parties squabbled over whether counsel could read from a particular document, wherein the court ordered counsel to "shut up." Then, soon after, in the same conference, defendant's counsel was warned by the court that it would find her in contempt if she continued to disregard the court's orders.

On one occasion out of the hearing of the jury, the court commented on the refusal of counsel to stipulate to certain documents. In response to counsel's request that the jury be informed that it is the client's decision whether to stipulate, the court noted, "I doubt very seriously if Miss Coe recommended to her client that he stipulate." Further, in response to counsel's comment that it would take a month to authenticate the documents without a stipulation, the court stated: "That's right exactly. But to this point it has been the obduracy, particularly of Gilbert Dowdy, that has made this necessary. He has refused to stipulate to anything." On another occasion, the court in-

structed defense counsel that she was "running for office" by her theatrics in the courtroom and that he was not going to allow it. In short, there were numerous instances of significant disruptions well beyond the scope of zealous advocacy.

On appeal to the Eighth Circuit, the Petitioner addressed the issue of his disruptive trial counsel. The brief on appeal as well as the oral argument stressed this issue and its effect on the rights of the accused to effective assistance of counsel, a fair trial and due process. On September 14, 1992, the Eighth Circuit Court of Appeals issued its opinion. See *United States v. Turner*, 975 F.2d 470 (8th Cir. 1992). The opinion rejected any claim that the defendant's rights of due process and a fair trial were infringed.

The Eighth Circuit in its opinion did not address the issue of effective assistance of counsel. Specifically, the court noted:

> Dowdy claims that Coe's actions denied him the effective assistance of counsel. We decline to consider this issue. Claims of ineffective assistance of counsel are normally not cognizable on direct review because of the need to develop facts not available from the trial record. This is particularly true where, as here, the issue was not raised below. See *e.g., United States v. Blackman*, 904 F.2d (250, 1259-60 (8th Cir. 1990). This claim is better addressed in proceeding under 28 U.S.C. § 2255.

This statement clearly indicates that the Court failed to take into account the nature of Dowdy's claim of ineffective assistance of counsel on direct appeal. In this case, the ineffective assistance claim is based on counsel's misconduct at trial. This misconduct is set out clearly in the record. The circumstances of Dowdy's claim do not require the development of facts outside the trial record. Further, the issue of trial counsel

misconduct was raised below and is evidenced both by the number of times counsel for co-defendants requested a mistrial and by the number of times trial counsel was held in contempt. Petitioner timely filed a motion for rehearing suggesting that the court had not fully addressed the issues of effective assistance of counsel in terms of whether Petitioner had received due process and a fair trial. That motion for rehearing was denied on October 21, 1992.

2. FACTS REGARDING MONEY LAUNDERING

Extensive evidence was presented with respect to cash expenditures made by Appellant Gilbert Dowdy. Most of this testimony was introduced as evidence for purposes of Counts 18, 20, 21, and 22. These counts charged Appellant with structuring financial transactions and money laundering. Appellant was acquitted of these charges.

As to Count 23, the government alleged that Petitioner Dowdy engaged in money laundering through the purchase of property from Judge Anthony Romano, a circuit court judge in Jackson County, Missouri. Between about February 17, 1989 and February 27, 1989, Romano and Gilbert Dowdy negotiated the sale of property located at 19 E. Armour and entered into a contract for such sale on February 27, 1989. The sale price of $300,00 was paid to Judge Romano in a series of cash payments made over a period of time. In arriving at the sale price, Gilbert Dowdy explained to Judge Romano that he was expecting $200,000 of insurance proceeds from a fire loss at another property which he would use to satisfy part of the purchase price. At their meeting on February 21, 1989, Gilbert Dowdy informed Judge Romano that the payments were going to be made in cash. At that point in the negotiations, Judge Romano voiced his concern about receiving cash for the transaction. He ceased negotiations and consulted with a number of

prominent community leaders with regard to the propriety of accepting cash in exchange for the property. The result of these discussions was the creation of a four-pronged test. If Gilbert Dowdy had no objection to any part of the test, Judge Romano could safely assume the money was obtained by Dowdy through a proper, legitimate source. The four-part test required a formal written contract showing the full purchase price of the sale; filing federal and state income tax based on the full purchase price of the sale; filing a 1099 S Form with the IRS showing receipt of the monies in question and obtaining the social security number of Mr. Dowdy and Judge Romano; and depositing with the bank an amount in excess of $10,000 which would require the bank to file a currency transaction report with the IRS with appropriate serial number. Appellant Gilbert Dowdy had no objection to any of the terms of the transaction. The contract was signed on or about February 27, 1989. The agreement also provided for a $200,000 cash down payment, the remaining $100,000 to be paid in periodic payments over the next six months. This set of facts constituted the basis of Count 23 of which appellant Gilbert Dowdy was convicted and sentenced to 240 months.

Further, appellant Gilbert Dowdy's conduct after purchase of 19 E. Armour road to refurbish and remodel the building provides the basis of Count 24. At the time of sale, Judge Romano knew that Gilbert Dowdy intended to open a night club at that location. Petitioner was charged with money laundering by allegedly utilizing money earned from narcotics transactions to purchase materials, supplies, furnishings, fixtures, equipment, services and labor for the refurbishing of 19 E. Armour. Petitioner was convicted of money laundering based on this conduct and sentenced to 240 months.

I. WHETHER THE CUMULATIVE EFFECT OF THE

ARGUMENTS BETWEEN THE DEFENDANT'S TRIAL COUNSEL AND THE TRIAL COURT SUBSTANTIALLY PREJUDICED THE DEFENDANT'S RIGHTS TO EFFECTIVE ASSISTANCE OF COUNSEL, A FAIR TRIAL AND DUE PROCESS OF LAW AS GUARANTEED AN ACCUSED PURSUANT TO THE FIFTH AND SIXTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AS THIS ISSUE IS AN IMPORTANT QUESTION OF FEDERAL LAW AFFECTING THE ADMINISTRATION OF CRIMINAL JUSTICE AND THE EIGHTH CIRCUIT'S OPINION IN PART IS IN CONFLICT WITH ITSELF AND OTHER CIRCUITS.

A. IMPORTANT QUESTION OF FEDERAL LAW

Granting the petitioner a writ of certiorari is proper, *inter alia*, when there exists an important question of law that should be addressed by this court. Petitioner asserts that the conflict between the trial court and defense counsel pervaded the entire 38 day trial and denied him effective assistance of counsel, a fair trial and due process of law. Whether the conduct at issue deprived Petitioner of these essential rights constitutes an important question of law which should be addressed by this court. Clearly, misconduct by the trial counsel is not necessarily a novel issue. However, the issue of how such conduct and the court's response is violative of the defendant's rights to due process and a fair trial is of particular concern in lengthy cases involving multiple defendants, and multiple disruptions by counsel. While this point was addressed by the Eighth Circuit, the Court's ruling failed to acknowledge the qualtative and quantative significance of the clashes upon the defendant's rights to a fair trial and due process.

As noted, the antagonism between the trial court and defense counsel is reflected throughout the trial transcript. Not only does the trial record itself establish trial counsel's

ineffectiveness, but even in its Order of Contempt, the trial court described counsel's cross-examination as tedious, aimless, beyond the scope of direct, and irrelevant. Counsel's conduct was further described as "outlandish" and "in a state of near hysteria." The District Court's order of contempt was affirmed on appeal. *See, United States v. Dowdy*, 960 F.2d 78 (8th Cir. 1992). The District

Court received requests on numerous occasions by counsel for the co-defendants to declare a mistrial as a result of the obvious hostilities between appellant's counsel and the court. The court refused.

As a result of trial counsel misconduct, the trial court was forced to take affirmative actions in an attempt to control the court proceedings. Of course, it is axiomatic that the court, in its judicial capacity, should always maintain a disposition of neutrality and impartiality regarding the parties during a trial. This appearance of neutrality is particularly important in cases where the attorneys for the parties may appear to be overly aggressive, rude, or where their actions provoke the court. This policy is based upon the high position of respect and authority that a judge carries into the courtroom. *See* American Bar Association Standard 6-3.4, Judge's Responsibility for Self Restraint.

The jury will often note the judge's behavior and prefer one party over the other based upon that noted behavior. This, in turn, causes prejudice to a party, depriving that party of the right to a fair trial as secured by the Due Process Clause of the Fifth Amendment as well as the Sixth Amendment. *See United States v. Candelaria-Gonzalez*, 547 F.2d 291 (5th Cir. 1977). In *Quercia v. United States*, 289 U.S. 466 (1933), the Supreme Court noted its concern about judicial intervention and its powerful effects by saying:

> "The influence of the trial judge on the jury is necessarily and properly of great weight" and "his lightest word or intimation is received with deference, and may prove controlling." This Court has accordingly emphasized the duty of the trial judge to use great care that an expression of opinion upon the evidence "should be so given as not to mislead, and especially that it should not be one-sided." (citations omitted) .

Quercia, 289 U.S. at 470. *See also, Estelle v. Williams*, 425 U.S.501 (1976). In *United States v. Singer*, 710 F.2d 431 (8th Cir.1983), the Eighth Circuit stated that while "it is a judge's privilege and duty to take an active part in the trial where necessary to clarify evidence and assist the jury, a judge must studiously avoid one-sidedness." *Singer*, 710 F.2d at 436 (citing, *Quercia*, 289 U.S. 466). In setting the standard for this issue in *Singer*, the court stated: "A few improper comments are not necessarily enough to require reversal. (citation omitted). Each case must turn on its own circumstances. Here, the judge injected himself into the trial throughout the entire proceeding." 710 F.2d at 436. Perhaps the standard is set forth best in *United States v. Bland*, 697 F.2d 262 (8th Cir. 1983):

> In each case, a balancing process must be employed to determine whether the trial judge's comments have pervaded the overall fairness of the proceedings. We think the balance is adversely tipped against the defendant in a criminal trial where the judge's role loses its color of neutrality and tends to accentuate and emphasize the prosecution's case.

Bland, 697 F.2d at 265. To find constitutional error, the judge's actions as a whole must be taken into account and throughout the course of the trial as a whole, the judicial intervention must

be "qualitatively and quantitatively substantial."

As set forth in *United States v. Malatista*, 583 F.2d 748 (5th Cir. 1978) the misconduct of defense counsel may also prejudice a defendant's rights to a fair trial. *Malatista*, 583 F.2d at 759. *United States v. Gonzalez*, 804 F.2d 691 (11th Cir. 1986) further shows that an abusive and antagonistic defense counsel may prejudice a defendant's rights to a fair trial. Although the great majority of cases concerning misconduct of counsel concern issues of prosecutorial misconduct, a defense attorney's actions may also prejudice the defendant's right to a fair trial. *See also, United States v. McLain*, 823 F.2d 1457 (11th Cir. 1987); *United States v. Alley*, 661 F.2d 718 (8th Cir. 1981); *United States v. Boatner*, 478 F.2d 737, 741 (2d Cir.) cert. denied, 414 U.S. 848 (1973).

In applying these principles to the instant cause, it is clear that the conduct of defense counsel and the responses of the trial court substantially prejudiced the defendant's right to a fair trial. In *Singer*, the court states: "A few improper comments are not necessarily enough to require reversal. Each case must turn on its own circumstances." 710 F.2d at 436. In the *Bland* opinion, the court sets forth a balancing test to determine overall fairness. 679 F.2d at 265. Certainly, the exchanges between the court and defense counsel began early in the trial and pervaded the entire proceeding right to the very end, exhibiting "qualitative and quantitative" disruption. *Robinson*, 687 F.2d at 361. Since the majority of these exchanges occurred either in the hearing or the presence of the jury, one can readily perceive the types of impressions a jury might draw concerning the petitioner. In the course of the trial, there was one significant curative admonition from the court to the jury concerning the confrontations. As the *Zebouni* and *Quercia* cases state, though, these kinds of instructions are not necessarily sufficient to remedy the perceptions that may have

resulted in the jury's minds. *Zebouni*, 226 F.2d 826, 827; *Quercia*, 289 U.S. at 472.

When a defendant's legal representative at trial exhibits egregious disrespect for the court, that same disrespect may cause the jury's objectivity to be affected. *United States v. Dellinger, 472 F.2d 340 at 385 (7th Cir. 1972), cert. denied*, 410 U.S. 970 (1973). Another detrimental effect of defense counsel's misconduct is that the court perceives the defendant in a dim light. An example is the "failure" to stipulate to certain facts, or in the failure to properly set forth an offer of proof. The petitioner was even unwilling to testify due to the verbal exchanges between his counsel and the court. In the instant cause, the petitioner was put in a difficult dilemma. On one hand, the petitioner was represented by an overly aggressive and disrespectful trial lawyer, at least in this case. On the other hand, the trial judge was clearly provoked by counsel's conduct. The court's provocation was exhibited in open court. When the petitioner stated his concern regarding his counsel's conduct and the court's response, he was informed to direct his comments to the court only through his counsel, one of the basic elements of his quandary. With an overly argumentative defense lawyer, a frustrated trial judge, and a jury tainted by the animosity, the petitioner's rights to a fair trial were denied.

Certainly, the trial judge is a highly experienced and respected jurist. Still, the cumulative effect of trial counsel's demeanor and actions when coupled with the trial court's responses merit review by this Court. Even the trial court's good faith attempt to cure the error caused by trial counsel in Instruction No. 63 arguably emphasized the issue once again to the petitioner's prejudice.

By granting this Petition for Writ of Certiorari, this Court may address the issue of trial counsel misconduct which is an

important issue affecting the fair administration of criminal justice. Misconduct of counsel to the extent and degree as occurred in this case renders the fair administration of criminal justice nearly impossible. The trier of fact is distracted from it's duties and the defendant's rights to a fair trial, due process and assistance of counsel are prejudiced. Review of this issue by this Court is necessary to protect the fair administration of criminal justice in this case as well as other cases.

B. THE EIGHTH CIRCUIT OPINION IS IN CONFLICT WITH ITSELF AND OTHER CIRCUITS.

Alternatively, certiorari is proper when a United States Court of Appeals has rendered a decision in conflict with itself or the decision of another United States Court of Appeals on the same matter. In this case, Petitioner asserts a conflict exists between this case and other Eighth Circuit cases as well as other circuits on the issue of whether a claim of ineffective assistance of counsel is addressed on direct appeal where there is sufficient evidence in the record to address such a claim. The trial record reflects extensive arguments between petitioner's trial counsel and the trial court. In many situations, the trial counsel for petitioner frustrated the court with improper questions, objections, insufficient offers of proof or other conduct. In other situations, the court unnecessarily injected itself into the trial proceedings. The cumulative effect of the demeanor and antagonism by trial counsel frustrated the trial court, confused the jury, and prejudiced petitioner's right to a fair trial.

Defendant is entitled to the effective assistance of counsel. *Powell v. Alabama*, 287 U.S. 45 (1932); *Johnson v. Zerbst*, 304 U.S. 458 (1935); *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Argersinger v. Hamlin*, 407 U.S. 25 (1972). In the frequently cited case of *Strickland v. Washington*, 466 U.S. 686 (1984), the Supreme

Court reiterated the well recognized proposition that the Sixth Amendment right to assistance of counsel exists in order to protect a defendant's fundamental right to a fair trial. Assistance of counsel means the effective assistance of counsel. *McMann v. Richardson*, 397 U.S. 759, 771, n. 14 (1970). Petitioner recognizes Eighth Circuit precedents indicating "claims of ineffective assistance of counsel are normally raised for the first time in collateral proceedings under 28 U.S.C. § 2255 . . . This is so because normally such a claim cannot be advanced without the development of facts outside the original record." *United States v. Blackman*, 904 F.2d 1250 (8th Cir. 1990); *United States v. Murphy*, 899 F.2d 714 (8th Cir. 1990); *United States v. Long*, 857 F.2d 436 (8th Cir. 1988); *United States v. Dubray*, 727 F.2d 771 (8th Cir. 1984). However, the Eighth Circuit has noted that where an adequate record exists, claims of ineffective assistance are properly heard on direct appeal. *United States v. Williams*, 897 F.2d 1430, 1434 (8th Cir. 1990). The record in the instant cause is quite clear and accurately records the numerous arguments between the trial court and trial counsel. The arguments and conduct of the trial counsel and trial judge forms the basis of the error. Therefore, this form of ineffective assistance of counsel is properly preserved for review on direct appeal.

Other circuits agree that where there is sufficient evidence in the record, ineffective assistance of counsel claims are properly addressed on direct appeal. See, for example, *United States v. Javino*, 960 F.2d 1137, 1145 (2nd Cir. 1992); *United States v. Wunder*, 919 F.2d 34 (6th Cir. 1990); *United States v. Reiswitz*, 941 F.2d 488 (7th Cir. 1991); *United States v. Molina*, 934 F.2d 1440, 1446 (9th Cir. 1991); *United States v. Andrews*, 953 F.2d 1312 (11th Cir. 1992).

In other cases, the Eighth Circuit has addressed ineffective assistance claims on direct appeal without explanation. See,

e.g. *United States v. Leone*, 823 F.2d 246 (8th Cir. 1987); *United States v. Mooney*, 769 F.2d 674 (8th Cir. 1985); *United States v. Dion*, 762 F.2d 674 (8th Cir. 1985); *United States v. Wiese*, 750 F.2d 674 (8th Cir. 1984); *United States v. Resnick*, 745 F.2d 1179 (8th Cir. 1984). By granting the Petition for Writ of Certiorari, this court would resolve the issue as to under what circumstances a claim of ineffective assistance of counsel will be addressed on direct appeal. This issue is also significant in that the Court's ruling could streamline and shorten the litigation process rather than create a rule whereby federal collateral proceedings are needlessly utilized. By addressing effective assistance of counsel claims when appropriately presented in the direct appeal, judicial resources are saved and yet a criminal defendant's rights are effectively guarded.

II. WHETHER THERE WAS SUFFICIENT EVIDENCE TO ESTABLISH A VIOLATION OF 18 U.S.C. § 1956(a)(l)(B) WHEN THE GOVERNMENT FAILED TO INTRODUCE EVIDENCE OF A PLAN OR SCHEME DESIGNED TO CONCEAL THE NATURE, SOURCE OR OWNERSHIP OF THE FUNDS USED IN THE TRANSACTIONS AT ISSUE AS THIS ISSUE IS AN IMPORTANT QUESTION OF FEDERAL LAW THAT AFFECTS THE ADMINISTRATION OF CRIMINAL JUSTICE AND WILL GIVE MEANINGFUL INTERPRETATION TO THE SCOPE OF THE SO-CALLED MONEY LAUNDERING STATUTES.

Because the court of appeals in this case has decided an important question of federal law which has not been, but should be, settled by this court, certiorari should be granted to resolve the issue of whether there was sufficient evidence to establish a violation of 18 U.S.C. § 1956(a) (1) (B) when the government failed to introduce evidence of a plan or scheme

designed to conceal the nature, source or ownership of the funds used in the transactions at issue. The final resolution of this case will not only affect this Petitioner, but will have a significant impact on each and every individual charged under the money laundering statues.

Count 23 alleges that Gilbert Dowdy committed money laundering offenses by purchasing a building located at 19 E. Armour, Kansas City, Missouri from Judge Anthony Romano. Count 24 alleges that Gilbert Dowdy committed additional money laundering offenses by payment of monies to renovate the building for purposes of opening a restaurant and night club there. Petitioner was convicted on both counts. It is petitioner's position that the proof in support of counts 23 and 24 is insufficient as a matter of law. The proof does not show that the transactions were designed to conceal the nature, the source, or ownership of the proceeds.

Petitioner was charged with money laundering under 18 U.S.C. §1956 (a)(1)(B). Under Section (B), the government is required to prove Petitioner conducted a financial transaction involving property which represents the proceeds of specified unlawful activity knowing that the property constitutes proceeds of some unlawful activity. The state of mind required under this section is "knowledge." "Knowledge" is defined either as "knowing that the transaction is designed in whole or in part to conceal or disguise the nature . . . of the proceeds of the specified unlawful activity" or as knowing that the transaction is designed to avoid a transaction reporting requirement under state or federal law. 18 U.S.C. § 1956(a)(l)(B). *United States v. Sanders*, 929 F.2d 1466 (10th Cir. 1991). As charged in the indictment, the government is required to prove that Petitioner knowingly used drug money to purchase and remodel the building located at 19 E. Armourr knowing that the transaction was designed to conceal the nature of the drug

proceeds.

Petitioner contends that the government failed to establish the necessary element of knowledge that the transaction was designed in part to conceal or disguise the nature, the source, the ownership or control the proceeds of the unlawful activity. While the property located at 19 E. Armour is owned by a corporation, the corporation was formed for liability purposes on the advice of corporate counsel. Gilbert Dowdy personally negotiated the sale price of 19 E. Armour and was also personally involved with the plans of the renovation of the building. Gilbert Dowdy made no attempt to disguise the transaction or the nature of the proceeds used to purchase and renovate the building.

The money laundering statute is not designed to reach all commercial transactions which involve the proceeds of unlawful activity. As noted in *United States v. Sanders*,:

> "to so interpret the statute would, in the court's view, turn the money laundering statute into a "money spending statute.". This interpretation would be contrary to Congress' expressly stated intent that the transaction being criminalized in the statute are those transaction "designed to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity."18 U.S.C. § 1956(a)(1)(B)(i). Thus, by the express terms of the statute, a design to conceal or disguise the source or nature of the proceeds is a necessary element for a money laundering conviction. (footnotes omitted).

United States v. Sanders, 929 F.2d 1472. Under this analysis the government is required to prove more than the fact that drug proceeds were used to make certain purchases. The

evidence adduced at trial does not support a finding that Gilbert Dowdy devised a scheme designed to conceal or disguise the nature of the proceeds.

At trial, the government presented the testimony of Judge Anthony Romano and numerous contractors involved in the renovation of 19 E. Armour in an attempt to establish Gilbert Dowdy's alleged scheme to conceal or disguise drug money. Neither Judge Romano's testimony nor any of the contractor's testimony was sufficient to meet the government's burden. In fact, Judge Romano's testimony, as well as other testimony, illustrated the fact that Gilbert Dowdy in no way tried to conceal or disguise the purchase. Each contractor readily identified Gilbert Dowdy as the owner of the building. Additionally, each of the contractor's testified that receipt of cash in exchange for renovation and remodeling services is not unusual nor abnormal in the black community. Further, Mr. Dowdy gave no indication to Judge Romano or any of the contractors that he wanted the cash payments concealed. Importantly, Dowdy complied with Judge Romano's request to abide by the federal reporting requirements.

The testimony in support of counts 23 and 24 is insufficient to establish a violation of the money laundering statute, 18 U.S.C. § 1956 (a)(1)(B). In an attempt to establish a violation of the money laundering statute, the government may not rely exclusively on proof that the defendant has no legitimate source of income. *United States v. Blackman*, 904 F. 2d 1250 (8th Cir. 1990). Further, even a finding that the monies used to purchase and renovate the building were in fact drug proceeds does not, without more, allow a finding that there was a plan to conceal the nature of the proceeds. The Eighth Circuit opinion suggests that because a jury could infer that the monies used to purchase and renovate the building were derived from illegal drug transactions and because the deed to the building

was held by a corporation, sufficient evidence was adduced to support the money laundering convictions. The other facts addressed at trial refute an inference that Petitioner intended to make it difficult for any outsider to connect Petitioner tb the Corporation or the building.

In short, petitioner respectfully suggests that insufficient evidence was adduced at trial to support a conviction on Counts 23 and 24. The government failed to introduce evidence that the transactions were designed to conceal the nature, source or ownership of the funds. The available case law interpreting the money laundering statutes suggests that proof of a plan or scheme designed to conceal the nature of the proceeds is necessary before an accused may be convicted. *See e.g., United States v. Sanders*, 929 F.2d 1466 (10th Cir. 1991). However, the Courts of Appeal have not given any meaningful guidance to the particular issue of "knowledge" as applied to Petitioner. Clearly, this issue is of significant importance to the administration of criminal justice and affects every defendant charged under the money laundering statutes. By granting this petition for writ of certiorari this court may clarify the scope of so-called money laundering statutes and ensure the proper administration of criminal justice.

CONCLUSION

The issues presented in this cause are of significant constitutional magnitude addressing the application of the Fifth and Sixth Amendments to the United States Constitution. Specifically, these issues include: (1) whether trial counsel's misconduct violated Petitioner's rights to a fair trial and due process of law; (2) whether trial counsel's misconduct violated Petitioner's rights to effective assistance of counsel; and (3) whether the scope and meaning of the money laundering statutes has been improperly construed by the Eighth Circuit.

It is necessary for this Court to address these issues as they constitute significant questions of federal criminal law particularly in view of the government's increased emphasis in the prosecution of financial crime cases and the ruling of the Eighth Circuit conflicts with rulings of itself and other Circuits.

WHEREFORE, for the foregoing reasons, Petitioner respectfully requests this Court grant his Petition for Writ of Certiorari.

Respectfully submitted,

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United States Court Of Appeals

FOR THE EIGHTH CIRCUIT

Nos. 91-1490WM, 91-1522WM, 91-1969WM

No. 91-1490WM

United States of America,
Appellee,

v.

Robert L. Turner,
also known as Rob,
Appellant.

No. 91-1522WM

United States of America,
Appellee,

v.

Gilbert L. Dowdy,
Appellant.

No. 91-1969WM

United States of America,
Appellee,

v.

Steven D. Baker,
Appellant.

On Appeal from the United States District Court for the Western District of Missouri.

Submitted: April 13, 1992

Filed: September 14, 1992

Before RICHARD S. ARNOLD, Chief Judge, ROSS, Senior Circuit Judge, and LOKEN, Circuit Judge.

RICHARD S. ARNOLD, Chief Judge.

Robert Turner, Gilbert Dowdy, and Steven Baker appeal their convictions stemming from their involvement in a drug-distribution conspiracy. We affirm.

On February 20, 1990, a grand jury returned a twenty-seven count indictment naming eleven people, including the defendants. The indictment involved charges related to a conspiracy, headed by Dowdy, to distribute cocaine and cocaine base in the Kansas City, Missouri, area, from early 1981 through January 19, 1990. Before trial, seven of the eleven charged in the indictment pleaded guilty, with some of them agreeing to cooperate with the government. Turner, Dowdy, Dowdy's brother, and Baker went to trial. After thirty-eight days of testimony and five days of deliberations, the jury acquitted Dowdy's brother, but found the other three guilty of various crimes. It found all three guilty of conspiracy. Additionally, it convicted Dowdy of two counts of money laundering and one count of structuring currency transactions; Turner of two counts of distributing cocaine base; and Baker of one count of distribution of cocaine base and one count of possession with intent to distribute cocaine base. These appeals followed.

Dowdy was sentenced to life imprisonment for conspiracy, ten years for the currency violations, and twenty years for the two money-laundering counts, all sentences to run concurrently. Turner was sentenced to ten years and one month for each offense of conviction, all sentences to run concurrently. Baker was sentenced to life imprisonment for conspiracy and distribution and forty years for possession with intent to distribute, all sentences to run concurrently.

I.

All of the defendants contend that the District Court abused its discretion by denying their repeated requests for a mistrial based on the confrontations between Dowdy's lawyer, Carol Coe, and the Court. They claim that the environment of hostility created by these repeated clashes — the defendants cite at least 32 such incidents — deprived them of a fair trial. In a related argument, Turner and Baker contend that the Court abused its discretion by denying their requests to have their trials severed from that of their co-defendants.

The parties agree that Coe's conduct during the course of the trial was, at times, outrageous. She regularly argued with the judge and his rulings, even after he told her to be quiet and warned that he would hold her in contempt and fine her $100 each time she disobeyed his orders. Despite these warnings, the Court held Coe in contempt on four occasions. During the last incident, the Court had her taken into custody by U.S. Marshals. After she apologized, however, she was released, and this fourth contempt order was vacated. On March 27, 1992, this Court affirmed the District Court's three contempt citations in *United States v. Dowdy*, 960 F.2d 78 (8th Cir. 1992). In addition to the incidents leading to her citations for contempt, Coe showed disrespect for and provoked the Court on several other occasions as well.

The confrontations between the District Court and Coe were unfortunate. After reviewing the incidents cited by the defendants in the context of the entire trial, see *United States v. Singer*, 710 F.2d 431, 437 (8th Cir. 1983) (en banc), however, we do not believe the confrontations prejudiced them or deprived them of a fair trial. While the number of confrontations was certainly significant, they are relatively insignificant in view of the overall length of the trial — 38 days. A fair number of the arguments occurred outside the jury's presence. Moreover, most of the arguments between Coe and the Court were limited to differences of opinion over how to examine witnesses or interpret the Federal Rules of Evidence. Thus, unlike the district court in *Singer*, 710 F.2d at 436, the judge here did not help the government try its case or "inject[] himself into the trial throughout the entire proceeding."

To the extent that the judge's comments were sarcastic or disparaging, they were directed towards Coe, not the defendants. Despite this, however, Coe remained a zealous, if not overzealous, advocate for her client. The judge showed no bias against any of the defendants or belief in their guilt. In fact, the jury acquitted Coe's client, Gilbert Dowdy, of nine of the fourteen counts submitted to it and acquitted Sam Dowdy completely. And finally, the Court issued three curative instructions to the jury concerning the arguments — two during trial, Trial Transcript Vol. XV at 62-64 and XIX at 58-60, and one in the final jury instructions. Government Addendum at 1-3. All three of the instructions reminded the jurors that confrontations between lawyers and the court should not have any effect on their determination of the defendants' guilt or innocence. Under all the circumstances, we reject the defendants' claim that the confrontations between Coe and the District Court deprived them of a fair trial.

Our conclusion that the defendants were not denied a fair

trial by the confrontations between Coe and the Court leads us also to reject their claim that they were prejudiced by the Court's failure to grant their motions for severance on the same ground. If anything, the bickering between Coe and the Court served to accentuate the differences between the defendants and actually may have helped Baker and Turner. The defendants sat at separate tables, so it is unlikely that the jurors viewed the defendants and their lawyers as a unified team. Moreover, given Dowdy's acquittal on nine charges, it is difficult to see how the Court's and Coe's confrontations prejudiced anyone, much less Dowdy's co-defendants.

II.

All of the defendants also argue that their conspiracy convictions must be reversed because the jury returned inconsistent verdicts concerning the object of the conspiracy. The indictment alleged a single conspiracy to distribute cocaine and cocaine base. On special verdict forms, the jury found Dowdy guilty of conspiring to distribute cocaine, Turner guilty of conspiring to distribute cocaine base, and Baker guilty of conspiring to distribute both. The defendants claim that these verdicts indicate that the jury found three conspiracies, each with different objects, instead of the single conspiracy alleged in the indictment and upon which it was instructed. For this reason, they claim that the verdicts improperly varied from, or constructively amended, the indictment.

The verdicts did not amend or vary from the indictment. The indictment charged the defendants with conspiring to distribute cocaine or cocaine base. Each of the defendants was found guilty of conspiring to distribute at least one of these substances. This Court has consistently held that where an indictment charges defendants with conspiring to distribute one or more drugs, only one of the drugs needs to be proved.

See, e.g., United States v. Klein, 850 F.2d 404, 406 (8th Cir.), *cert. denied*, 488 U.S. 867 (1988). Moreover, the fact that the jury concluded that each defendant handled different combinations of drugs does not mean that there was not one overall conspiracy to distribute cocaine-related products. As we stated in *United States v. Regan*, 940 F.2d 1134, 1135 (8th Cir. 1991) (citation omitted), "[t]he existence of a single agreement can be inferred when the evidence reveals the participants shared a common aim or purpose and mutual dependence and assistance existed." *See also United States v. Roark*, 924 F.2d 1426, 1429-30 (8th Cir. 1991). The jury's guilty verdicts reflect its conclusion that the defendants participated in different ways in one overall conspiracy. We will not disturb that conclusion.

III.

As a second ground for reversing their conspiracy convictions, Dowdy and Turner claim that the District Court erred in answering a jury question. During its deliberations, the jury asked the Court whether one of the defendants had to be linked to a conspiracy proved to exist in early 1981. The Court responded:

> The answer to your . . . question is a qualified "yes." In other words, you must be satisfied that the conspiracy alleged was in existence or came into existence in or about early 1981. The proof need not establish with certainty the exact date of the alleged offense. It is sufficient if the evidence in the case established beyond a reasonable doubt that the offense was committed on a date reasonably near the date alleged.

The defendants claim the Court's response misstated the law and impermissibly amended, or varied from, the indictment.

The government did present evidence, via Jay Flott's and Carolyn Tanner's testimony, that a conspiracy involving Dowdy came into existence in early 1981. Even without this evidence, however, the Court's response would still not be erroneous. It has long been the law of this Circuit that "a variance between the date in the indictment and the proof is not fatal if the proof shows that the acts charged were committed on a date within the statute of limitations and prior to the return date of the indictment, as long as the date was not a material element of the crime charged." *United States v. Joyner*, 539 F.2d 1162, 1164-65 (8th Cir.), *cert. denied*, 429 U.S. 983 (1976) (citations omitted). Time is not a material element of a conspiracy charge. Thus, the District Court did not err in answering the jury's question, except possibly in defendants' favor.

IV.

Next, Turner argues that his conspiracy conviction is supported by insufficient evidence. After reviewing the evidence in the light most favorable to the government, we reject this claim. Turner's participation in the conspiracy was not so extensive as Dowdy's or Baker's. Once the government has proved the existence of the conspiracy, however, only slight evidence is needed to connect a particular defendant to the scheme. *See, e.g., United States v. Lee*, 743 F.2d 1240, 1250 (8th Cir. 1984). Evidence linking Turner to the conspiracy included Lewis Smith's testimony that Turner worked for Baker in his drug business, Trial Transcript Vol. V at 25, and Terry Boydston's testimony that it was his understanding that Baker resupplied Turner with cocaine base when his supply ran out. Trial Transcript Vol. X at 22-23. This evidence indicates the government met its burden of connecting Turner to the conspiracy.

V.

Turner claims that he is entitled to a new trial because he did not knowingly and intelligently waive his Sixth Amendment right to his counsel's being present during portions of eight days of the trial. On the first day of trial, during the voir dire of the jury, Turner's counsel, Robert Duncan, asked for permission to be excused for the afternoon session. The following discussion occurred in the judge's chambers immediately after this request:

> MR. DUNCAN: My client has filed a formal waiver of being present and me being present during certain proceedings. I don't have any interest in the motions they are talking about and I have no problems with the questionnaire and what their answers are. And I will give somebody else my own voir dire strikes. Can I be excused this afternoon?
>
> THE COURT: Where is your client?
>
> MR. DUNCAN:He's right back here.
>
> THE COURT:It is agreeable with you?
>
> MR. TURNER:It's okay with me.
>
> MR. DUNCAN:Can he be gone, too? Judge, here is my copy of the waiver.
>
> THE COURT:You understand, Mr. Turner, that the mere fact that your lawyer might not be here or you might not be here, this waiver does not include his own absence.
>
> MR. DUNCAN:I thought I did put it in there someplace.

THE COURT: His own presence, yes. I am very reluctant to permit him to be absent. **It seems to me he can't even begin to appreciate the significance of that and what it might mean to him down the line. It spelled out here what it might mean for you to be absent,** but I am going to require him to be here.

And, Mr. Turner, you understand according to the waiver that things might happen that would be detrimental to you at a time when Mr. Duncan wasn't here. And although I certainly have an obligation to protect everybody to a certain extent, I cannot guarantee you I will be in a position to point those things out if Mr. Duncan isn't here.

MR. TURNER: Yes, that's all right.

THE COURT:You are agreeable to his not being here?

MR. TURNER:I agree to that, but you say I have to be here?

THE COURT:Yes.

MR. TURNER:That's no problem.

Government Addendum at 9-10 (emphasis supplied).

The waiver, signed by Turner, stated:

That this Defendant has been fully advised of his rights to the effective representation of counsel.

That the Defendant has conferred with his counsel, Robert G. Duncan, regarding what evidence will be offered against him in the trial on this case.

> That the Defendant, Robert Turner is aware that much of the evidence to be presented in this case pertains to financial matters of Gilbert Dowdy, Rodney Miller, and others, but not this Defendant.
>
> That the Defendant is aware that he has the right to have his counsel present during the presentation of all of the testimony of this cause, but is aware that . . . much of the testimony consist[s] of matters upon which his counsel would have no cross-examination.
>
> That the Defendant, Robert Turner is aware that if his counsel is not present in the courtroom [and] that if any testimony that is prejudicial to him is introduced that no objection could be made thereto, no cross-examination made thereof and so there would be no one in the courtroom protecting his interests.
>
> That Robert Turner has no objection to his counsel being absent during those portions of the proceeding, including the presentation of evidence, to which his counsel determine[s] that his presence is not essential in the protection of the rights of the Defendant, Robert Turner and that Robert Turner does hereby specifically and particularly waive the assistance of counsel, and his own presence if approved by the Court, during such periods.

Government Addendum at 7-8. During the times that Duncan was not present, Turner had substitute counsel, usually one of his co-defendant's lawyers.

This is not a claim of ineffective assistance of counsel, with respect to which a close inquiry must be made into whether defendant was prejudiced. This is a claim that Turner had no

lawyer of his own at all on parts of eight trial days. In such a situation, prejudice is presumed, or, to put it in plain words, prejudice need not be shown. *See United States v. Cronic*, 466 U.S. 648 (1984). A defendant is entitled to counsel at every critical stage of the proceedings against him, and the trial is the paradigmatic critical stage. The right to counsel can be waived, of course, but the waiver must be knowing and intelligent, and it is appropriate for proceedings to determine waiver to be conducted by the judge in open court. *Johnson v. Zerbst*, 304 U.S. 458 (1938). This was not done here.

We conclude that Turner's waiver was nevertheless knowing and intelligent, and therefore legally effective. The Court did examine him in open court and determined that he was agreeable to the arrangement being proposed. In addition, the Court observed that "[i]t spelled out here [referring to Turner's written waiver] what it might mean for you [counsel] to be absent . . .." Government Addendum at 10. The Court did not examine Turner on the possible consequences of his decision, but the written waiver, signed by Turner, recited that he had "been fully advised of his rights to the effective representation of counsel," Government Addendum at 7, and listed further respects in which counsel's absence might disadvantage Turner. Defendant does not claim that he was misled or that the events recited in the written waiver did not occur. His argument, rather, as we understand it, is simply that his waiver is ineffective because the Court did not personally go over with him the possible consequences of counsel's absence. This of course would have been the preferable procedure. Indeed, the Court would have been well within its rights to refuse counsel's request to be absent. We consider it extraordinary for a lawyer, with or without the consent of his client, to absent himself from a trial. The question here, however, is the appropriate disposition of this conviction, and we are not per-

suaded that Turner received anything different from what he himself had agreed to. He was of age and competent. His decision was voluntary. We do not believe that the Constitution requires us to relieve him of its consequences. In effect, the Court, instead of examining Turner itself, satisfied itself that Turner's lawyer had properly advised him. We believe this is constitutionally sufficient.

VI.

Dowdy claims that insufficient evidence supports his conviction on two counts for money laundering, in violation of 18 U.S.C. § 1956(a)(1)(B)(i). Specifically, he claims that the government did not prove beyond a reasonable doubt that he knew the source of the funds was illegal or that either of the transactions was designed to conceal the nature, source, or ownership of the funds.

The money-laundering counts arose from Dowdy's purchase of a building at 19 East Armour in Kansas City, Missouri, and his later renovation of it. Although the government did not directly prove that the money Dowdy used to pay for the building came from drug sales, it was reasonable for the jury to infer this from the evidence. *See Blackman*, 904 F.2d at 1257. There was extensive testimony about Dowdy's drug operations. From 1983 to 1989, Dowdy's expenses exceeded his income by over $657,000. Dowdy made over $600,000 in payments on the building and for its renovation in cash. Similarly, while the seller and the renovation contractors dealt with Dowdy directly concerning the building, this does not mean the transactions were not designed to conceal Dowdy's drug proceeds. Dowdy was not publicly known as the owner of the building. The deed to the building was held by a corporation formed by a lawyer hired by Dowdy's lawyer, an arrangement surely designed to make it difficult for any outsider to connect

Dowdy with the corporation. As we stated in *United States v. Sutera*, 933 F.2d 641, 648 (8th Cir. 1991), "the money laundering statute does not require the jury to find that [the defendant] did a good job of laundering the proceeds." We affirm Dowdy's convictions for money laundering.

VII.

Baker also makes an insufficiency-of-the-evidence argument. He claims that the government did not prove beyond a reasonable doubt that he distributed cocaine base or possessed cocaine base with the intent to distribute it. Sufficient evidence supports the jury's verdict of guilt on the distribution count. Eric Burgin identified Baker as the person who negotiated the sale in a telephone conversation recorded by the government and testified that Baker was in the car that dropped Turner off to deliver the cocaine base. Apparently, the jury rejected Baker's expert's testimony that the voice on the tape recording was not his. The jury was free to disregard this testimony. Moreover, the fact that Burgin originally identified the person on the telephone as Turner, not Baker, but later changed his mind, does not mean his testimony was inherently incredible. Again, the jury apparently believed — and was entitled to believe — that the later identification was the correct one.

Sufficient evidence also supports Baker's conviction for possession with intent to distribute cocaine base. During a search of his girlfriend's mother's house, the police found Baker lying in bed with his girlfriend and their baby. At the foot of the bed, the police found a jacket with a plastic pouch containing cocaine and cocaine base in the pocket. Although the pouch did not have any fingerprints on it, it was nevertheless reasonable for the jury to infer that the jacket was Baker's and that he had constructive possession of it and its contents.

VIII.

Baker claims the District Court erred by refusing to instruct the jury that the mere existence of a buyer-seller relationship is insufficient to prove a conspiracy. Although this is a correct statement of the law, *see, e.g., United States v. Prieskorn*, 658 F.2d 631, 633 (8th Cir. 1981), the District Court did not err in refusing to instruct the jury on this defense theory. Baker was entitled to an instruction reflecting his theory of the case only if the evidence supported it. Here, the evidence did not.

From as early as 1986 through 1989, Baker received large amounts of cocaine from Dowdy. Baker, in turn, distributed this cocaine to Turner and others through a so-called "crack house." It is true that the government presented no evidence of an agreement between either Dowdy and Baker, or Baker and Turner, concerning how much they would charge their customers, who their customers would be, or how they would make their sales. Nevertheless, the ongoing nature of these relationships, involving tremendous amounts of cocaine, indicates a conspiracy and distinguishes this case from *Prieskorn*, upon which Baker relies. In *Prieskorn*, we held that while sufficient evidence supported the defendant's conspiracy conviction, the district court committed reversible error by refusing his buyer-seller jury instruction. We stated that a reasonable juror could have believed that Prieskorn was merely a buyer because he made one purchase, knew only one of the alleged conspirators, and did not order the drugs he purchased. *Id.* at 636. In this case, no reasonable juror would have believed that Dowdy, Baker, and Turner were involved in only buyer-seller relationships.

IX.

Baker's final argument is that the District Court erred in imposing his punishment. He claims the Court erred in cal-

culating his base offense level under the Sentencing Guidelines by attributing 15 kilograms of cocaine base to him. Since he did not object to this calculation below, we will reverse only if the District Court committed plain error. Vicky Nixon testified at trial that Baker received between one to five kilograms of cocaine a week beginning in early 1988 and ending in the fall of 1989. In addition, the presentence report stated that while Baker did not always sell his cocaine in the form of cocaine base, "he was fully aware that his coconspirators were doing so . . .." Report at 11. The District Court's reliance on this conclusion at sentencing was not plain error. Baker also disputes the $25,000 fine imposed by the Court, arguing that he is unable to pay it. We affirm the assessment of the minimum statutory fine. The District Court did not clearly err by concluding that Baker "would be able to pay the fine assessed in the Inmate Financial Responsibility Program while working in Un[ic]or[ ]." Sentencing Transcript at 24.

* * *

Affirmed.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.